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No. 88-2051

IN THE

Supreme Court of the United States

October Term, 1988

LONGVIEW FIBRE COMPANY,

Petitioner,

vs.

JEANNETTE PAPER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether Longview has properly preserved any constitutional challenge to the punitive damages award entered below, where Longview failed to raise any constitutional challenges at trial or on direct appeal to the court whose decision is sought to be reviewed.

II. Whether the instant case is an appropriate one in which to consider Longview's constitutional claims, where Longview failed to raise any challenge as to the standards under which punitive damages were awarded below, and where the award in any event bore a reasonable relationship to Jeannette's actual damages, was substantially less than the earnings realized by Longview as a result of its tortious conduct, and represented a modest sanction in light of Longview's egregious conduct.

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Statement of the Case

Longview Fibre Company ("Longview") has filed a petition for a writ of certiorari, seeking review of an order entered by the Superior Court of Pennsylvania on September 26, 1988. The order in question affirmed, *inter alia*, an award of punitive damages to Jeannette Paper Company ("Jeannette"), based on common law principles of tortious interference with contractual relations. Specifically, the evidence presented at trial established that in the Fall of 1983, Longview, under the guise of engaging Jeannette as a broker of a specialized grade of paper known as interleaving paper, secured information and samples regarding Jeannette's principal and longstanding

interleaving customer, Allegheny Ludlum Steel Corporation. Thereafter, rather than utilizing Jeannette as a broker, Longview repudiated its agreement with Jeannette, and took advantage of the information and samples received from Jeannette in order to acquire the Allegheny Ludlum account for itself, to Jeannette's exclusion. In so doing, Longview thereby appropriated an existing customer of Jeannette's, under false pretenses, so as to deprive Jeannette not only of the benefit of Jeannette's brokerage agreement with Longview, but also of its existing and future interleaving business with Allegheny Ludlum, which dated back to the 1960's. As a result, Jeannette's interleaving sales to Allegheny Ludlum, which had previously been maintained at a level of approximately $1.5 million per year, were virtually eliminated. (A. 10a; R. 205a-208a, 257a, 261a-265a, 438a, 760a). Correspondingly, Longview, which had never previously marketed interleave to any source, took advantage of its wrongful appropriation of the Allegheny Ludlum account, so as to realize earnings of Five Million ($5,000,000) Dollars as of the date of trial, with earnings of a comparable nature being anticipated in the future. (A. 10a; R. 371a-372a, 759a).

In addition to having taken the foregoing course of action, and realizing the benefits resulting therefrom, Longview pursued this course with full knowledge of the detrimental effects its actions would have on Jeannette. (A. 20a; R. 438a). Moreover, Longview thereafter sought to hide its unethical practices, by attempting to eliminate evidence of its brokerage relationship with Jeannette and the fact that Longview had acted on information supplied by Jeannette in order to effectuate direct sales to Allegheny Ludlum. (A. 20a-21a). This included eliminating reference to Jeannette as a customer of Longview's, after having previously opened a line of credit, since Longview "could smell an awful problem

down the road [with Jeannette]". (R. 433a-434a). It also included otherwise attempting, through deception and misrepresentation, to create the after the fact impression that Longview had pursued and secured the Allegheny Ludlum account independently of Jeannette, when all credible evidence demonstrated otherwise. (A. 10a-11a). As a consequence, the evidence below established not only that Longview had wrongfully appropriated Jeannette's principal interleaving customer, and thereby replaced Jeannette as that customer's sole source of interleave, but that Longview had thereafter pursued a course of action, both with Jeannette and at trial, designed to obfuscate its true actions and intentions, in an outrageous effort to avoid liability for its wrongful acts. (A. 20a-21a).

Based on the foregoing evidence, the jury, finding that Longview had breached its brokerage agreement and tortiously interfered with Jeannette's business relationship with Allegheny Ludlum, awarded Jeannette $244,000.00 in compensatory damages, and $500,000.00 in punitive damages. Longview's post-trial motions were denied, and the judgment of the trial court was thereafter affirmed on direct appeal to the Superior Court of Pennsylvania. Longview's petition for a writ of certiorari seeks review of that Superior Court judgment, and requests that this Court consider whether the aforesaid award of punitive damages as assessed against Longview violates the Eighth and Fourteenth Amendments to the Constitution of the United States. Significantly, at trial, in post-trial motions and on direct appeal to the Superior Court of Pennsylvania, Longview at no time raised any constitutional challenges to the assessment of punitive damages against it, nor in fact did Longview raise any challenge to the amount of the damages awarded or the method by which they were calculated.

Summary of Argument

Because Longview failed to raise any constitutional challenge to the punitive damages award before the state trial court or on direct appeal to the Superior Court of Pennsylvania, this Court lacks certiorari jurisdiction. Alternatively, this Court should decline to grant review on writ of certiorari, since no constitutional challenges were properly pressed or passed upon below, and accordingly no important question of federal law was decided by the Pennsylvania state courts. *See* Sup. Ct. R. 17.

Even had Longview properly preserved any constitutional challenge to the punitive damages award in question, any such challenge would be without merit both under the facts of this case and in view of this Court's recent decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985 (U.S. June 27, 1989), *affirming* 845 F.2d 404 (2d Cir. 1988). *Browning-Ferris* expressly held that the Excessive Fines Clause of the Eighth Amendment has no application to punitive damage awards entered in disputes between private parties. Any due process challenge to the award under the Fourteenth Amendment would likewise be unavailing, since any due process concerns would of necessity be directed to the amount of the award and the standards under which the award was assessed. These matters were never challenged by Longview at trial or on direct appeal on any grounds, constitutional or otherwise, and cannot properly be challenged now. Nor would any such challenge have merit, since the punitive amount awarded bore a reasonable relationship to Jeannette's compensatory damages, was substantially less in amount

than the earnings Longview derived from its tortious conduct, and was the product of standards which were appropriately considered and properly applied by the jury.

In sum, this is simply not a case of an unreasonable, excessive or disproportionately large award. To the contrary, in view of the actual damages sustained by Jeannette, the outrageous nature of Longview's conduct, and the gains realized by Longview as a result of that conduct, the award was wholly reasonable and could justifiably have been much larger. This is particularly true in light of Longview's substantial financial resources, Longview being a Five Hundred Million ($500,000,000) Dollar corporation, and the fact that the punitive effect may well be lost on Longview, which acknowledged at trial that to a company of its size, Five Million ($5,000,000) Dollars is only a small portion of its sales and nothing to be overly concerned about. (R. 371a). Accordingly, any due process arguments, when raised in the context of the instant facts, are without merit, and offer no important reason to warrant the grant of review by this Court.

ARGUMENT

I. Under the Principles Announced by this Court in *Browning-Ferris,* Longview has Failed to Properly Preserve any Constitutional Challenge to the Punitive Damages Awarded Below, by Failing to Assert any Constitutional Claims at Trial or on Direct Appeal to the Superior Court of Pennsylvania.

In its petition for writ of certiorari, Longview requests that this Court review the punitive damages award entered against it on constitutional grounds. In its petition, however, Longview neglects to mention that it never raised any constitutional challenge to the punitive damages award at the Pennsylvania state trial court level, including in Longview's post-trial motions, as required by Pennsylvania practice. Pa.R.Civ.P. 227.1(b)(2). (A. 28a; R. 847a). Nor did Longview raise such a challenge before the Superior Court of Pennsylvania, the very court whose judgment is sought to be reviewed. To the contrary, a review of the record as established before the trial court and the Pennsylvania Superior Court reveals that Longview failed to raise any challenge to the punitive damages award, constitutional or otherwise, other than to allege that Longview's actions were not sufficiently egregious to warrant the imposition of punitive damages under common law tort standards. (A. 20a-21a; R. 847a). Based on a review of the evidence presented, however, this argument was soundly rejected by the trial court (A. 28a) and by the Superior Court. (A. 19a-A. 21a).

Nor did Longview raise any constitutional claims in its Petition for Allowance of Appeal as filed with the Supreme Court of Pennsylvania, pursuant to which Longview requested that the Supreme Court of Pennsylvania assume discretionary jurisdiction over this

matter. Rather, the first time Longview challenged the punitive damages award on constitutional grounds was in an Application for Reconsideration filed with the Pennsylvania Supreme Court, after the Pennsylvania Supreme Court had already denied Longview's Petition for Allowance of Appeal and thereby declined to exercise discretionary jurisdiction.

Under these circumstances, the constitutional issues advanced in Longview's petition fall outside of this Court's certiorari jurisdiction, and warrant prompt denial of the petition. Specifically, the issues advanced in Longview's petition have not been properly "pressed or passed upon below." *Bankers Life and Casualty Company v. Crenshaw,* 108 S.Ct. 1645, 1651 (1988). Nor could such claims have been properly pressed or presented on appeal in the Pennsylvania state court system, once Longview had failed to raise these claims at trial. Specifically, in this regard, Pennsylvania law is clear that "constitutional issues will be [considered] waived when they have not been raised in the lower court and are argued for the first time on appeal." *Gerace v. Holmes Protection of Philadelphia,* 357 Pa. Super. 467, 516 A.2d 354 (1986), *alloc. denied,* 527 A.2d 541 (1987); *Consumer Party of Pennsylvania v. Commonwealth of Pennsylvania,* 510 Pa. 158, 507 A.2d 323 (1986).

In the instant case, a review of Longview's post-trial motions before the trial court, and of the questions presented by Longview before the Superior Court, makes it apparent that Longview has waived any constitutional challenge to the punitive damages award in question. (R. 847a; A. 20a). In particular, the opinion of the Superior Court confirms not only that such issues were not "pressed or passed upon below", but that in fact

Longview failed to even challenge the *amount* of the punitive damage verdict as rendered by the jury below. Specifically, as stated by the Superior Court:

> [I]t is important to note that [Longview's] challenge in the instant case is not directed toward the amount of the punitive damage verdict rendered by the jury.... Accordingly, we do not address the amount of punitive damages determined to be appropriate by the jury in the case, as that issue is not presented for our review. (A. 20a, n.2).

As this Court most recently noted in *Browning-Ferris*, constitutional challenges which are not raised at trial or on direct appeal below, and which therefore do not allow for the development of a record at the trial and appellate court levels, are not properly preserved and will not be considered by this Court. 57 U.S.L.W. at 4990 n.23. Accordingly, Longview's failure to properly raise a constitutional challenge to the punitive damages award below warrants denial of Longview's petition for writ of certiorari.

Similarly, denial of the writ in this case is warranted in accordance with the principles discussed in *Bankers Life and Casualty Co., supra.* Specifically, in *Bankers Life*, this Court held that a failure to properly raise a constitutional challenge to an award of punitive damages under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment warranted denial of certiorari review, either for lack of jurisdiction, or alternatively, on various policy grounds. 108 S.Ct. at 1651. These policy grounds—comity to the states, the need for a properly developed record on appeal, and the availability of less intrusive methods of resolving the issues—apply in full force in the instant case. In particular, Longview failed to allow for the development of a record below by its

failure to present any constitutional arguments at trial or on direct appeal. Furthermore, by failing to raise any challenge to the size of the award on any grounds, Longview precluded the state courts from addressing or determining the propriety of the award on independent, nonfederal grounds. Having failed to challenge the award as excessive on any grounds below, Longview cannot properly challenge the amount awarded on constitutional grounds herein, and its petition must be denied.

Finally, Jeannette would note that any effort by Longview to attempt to preserve a right to pursue a constitutional challenge, based on its Application for Reconsideration filed with the Supreme Court of Pennsylvania, would of necessity be unavailing. First, no constitutional issue was pressed or passed upon below before the Superior Court of Pennsylvania, the court whose judgment is being sought to be reviewed. Furthermore, the issue was not pressed or passed upon below by the Supreme Court of Pennsylvania, since it was not raised in Longview's initial Petition for Allowance of Appeal, and because the Supreme Court of Pennsylvania in any event declined to exercise discretionary jurisdiction over the matter. Nor would the Pennsylvania Supreme Court have had a basis to consider a constitutional challenge, since any constitutional challenge would have been waived by Longview's failure to raise it at trial or on direct appeal.

Moreover, this is not a case in which, although a constitutional or other federal claim may not have been presented at the trial court level, it was presented on direct appeal and accordingly acted upon either by the appellate tribunal on direct appeal or by the trial court.

Rather, the only tribunals exercising jurisdiction in this case, being the trial court and the Superior Court of Pennsylvania, were never presented with a constitutional claim and therefore were never called on to address any constitutional issue whatsoever. Furthermore, since the Supreme Court of Pennsylvania was not required to exercise jurisdiction over the matter, and declined to do so, without opinion, not only did the Pennsylvania Supreme Court not exert jurisdiction, but there is no opinion for constitutional review purposes, and any constitutional challenge has thereby come too late for consideration here. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Bankers Life, supra.*

For each of the foregoing reasons, Longview has failed to properly preserve a constitutional challenge to the punitive damages award, and Longview's petition for writ of certiorari must be denied.

II. Based on the Recent Holding of this Court in *Browning-Ferris,* the Excessive Fines Clause has no Application to the Punitive Damages Award Entered Below.

Even assuming that Longview's constitutional challenges to the punitive damages award entered in this case had been preserved, these challenges as applied to the facts of this case fail to present any important questions of federal law and are in fact wholly without merit. In this connection, Longview has asserted, *inter alia*, that the punitive damages award in question violates the Excessive Fines Clause of the Eighth Amendment. In support, Longview references the arguments presented to this Court by the petitioner in *Browning-Ferris.* However, subsequent to the filing of Longview's petition, this Court expressly rejected these arguments, holding that the Excessive Fines Clause does not apply to punitive damages awards entered in disputes between private parties. 57 U.S.L.W. at 4990. Similarly, Longview's argument to the effect that the punitive damages award is excessive, and thereby violates fundamental fairness, has not only been waived (A. 20a, n.2), but is likewise without merit in light of the *Browning-Ferris* decision.

III. The Award of Punitive Damages Entered in this Case was Properly Assessed and Reasonable in Amount.

In the instant case, as noted *supra*, Longview never challenged the constitutionality of the punitive damages awarded at trial or on direct appeal, nor did it challenge the amount of the award on any grounds below, constitutional or otherwise. Consequently, having failed to raise any challenge to the size of the award, Longview cannot properly pursue a constitutional challenge to the award herein, or to the standards under which it was awarded. This is particularly true in view of the fact that Longview never challenged the standards under which the jury was charged with respect to an award of punitive damages. In this regard, at trial and on appeal, Longview's sole argument on punitive damages was that its conduct was innocent and therefore not sufficiently egregious to support a punitive damages award. In fact, however, as the jury found and as the Superior Court of Pennsylvania recognized on appeal, the evidence in this case fully supported a punitive damages award and unquestionably evidenced outrageous conduct by Longview. Under these circumstances, any due process challenge regarding the standards under which the jury calculated the amount of the punitive damages has clearly been waived.

Furthermore, even assuming that a constitutional due process challenge to the punitive damages award was preserved, the punitive damages award in the instant case was entirely consistent with due process and represented an appropriate sanction which could in no respect be interpreted either as unduly punitive or unforeseeable by Longview. In this regard, the jury was properly instructed as to the factors to be considered in

determining the proper sanction, including the character of Longview's actions, the nature and extent of the harm suffered by Jeannette, and Longview's financial condition insofar as relevant to punish and deter it from similar conduct in the future. The jury was also instructed that the award not be the result of passion or prejudice, but solely designed to punish and as a deterrent. (R. 626a-627a).

In consideration of these factors, the jury returned an award which not only bore a reasonable relationship to Jeannette's compensatory damages, but which was substantially less than the earnings Longview itself derived as a result of its tortious actions in this case. Specifically, as demonstrated at trial, Longview, as a result of tortiously appropriating Jeannette's principal customer, had realized approximately Five Million ($5,000,000.00) Dollars in earnings as of the date of trial, with continuing earnings of a comparable nature being anticipated in the future. With this in mind, and in further view of Longview's worth, with Longview being described as a Five Hundred Million ($500,000,000.00) Dollar corporation (R. 371a), there can be no question but that Longview, rather than being unduly punished, in the long run substantially benefited from its improprieties. Consequently, the award assessed against Longview was in no respect excessive, outrageous or unduly punitive, and was awarded based on a full consideration of all appropriate factors.

In this connection, for Longview to allege that it did not know that the conduct in which it engaged was prohibited, or that it could be subject to a punitive award if it engaged in outrageous conduct, runs contrary not only to the instructions supplied by Longview to the trial court (R. 820a-821a), which recognized

that Longview could be held liable for outrageous conduct, but is also belied by the fact that punitive sanctions for similar outrageous actions have been assessed on a longstanding basis. *Thompson v. Swank*, 317 Pa. 158, 176 A. 211 (1934); *Richette v. Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Certified Laboratories of Texas, Inc. v. Rubinson*, 303 F.Supp. 1014, 1028-1029 (E.D. Pa. 1969). Furthermore, since the award in this case did bear a reasonable relationship to Jeannette's actual damages, the punitive damages were assessed in full accord with Longview's due process rights, and represented a wholly foreseeable and appropriate sanction in view of Longview's actions.

IV. The Award Entered Below was Assessed Pursuant to an Appropriate Standard of Proof.

Lastly, Longview alleges that this Court should review the punitive damages award to determine whether punitive damages may be awarded on a "preponderance of the evidence" standard. Again, this is an argument which Longview failed to raise at trial or on direct appeal, and which is not properly preserved for review. In fact, Longview never even suggested any particular standard of review to be applied in considering an assessment of punitive damages, other than itself supplying instructions calling for a "preponderance of the evidence" standard in assessing certain of Jeannette's claims. Significantly, the trial court's charge itself was in full conformity with Longview's requested instructions in this regard. (R. 608a-609a, 807a-821a).

Moreover, assuming that this challenge had been properly preserved, the instant case, unlike the cases cited by Longview, involves neither a criminal action nor an action by a government against an individual. Rather, this case involves a civil dispute between private parties, as to which the standard of proof applicable to civil actions was therefore properly applied. In this connection, as recognized by this Court in *Browning-Ferris*, punitive damages as assessed here are in the nature of private civil damages awards, and do not constitute fines as imposed in criminal actions. Consequently, Longview's arguments in this regard are likewise without merit.

Conclusion

Applying the principles announced in this Court's recent decision in *Browning-Ferris,* Longview has failed to properly preserve any constitutional challenges to the punitive damages award entered below. Furthermore, Longview has failed to raise any constitutional claims of substantive merit under the facts of this case. For these reasons, and because the *Browning-Ferris* decision as announced subsequent to the filing of Longview's petition renders Longview's arguments meritless, Longview's Petition for Certiorari should be denied.

Respectfully submitted,

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